The Goldman Sachs Group, Inc.
200 West Street │ New York, NY 10282

April 25, 2022

Via Email

Securities and Exchange Commission,
100 F Street NE
Washington, D.C. 20549-1090
Attn: Vanessa A. Countryman, Secretary

Re: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (File No. S7-03-22)

Ladies and Gentlemen:

The Asset Management Division of Goldman Sachs ("AMD")[1] appreciates the opportunity to comment on the Securities and Exchange Commission's (the "SEC") proposed rule (the "Proposed Rule") relating to private fund advisers. AMD is a separately identifiable division of Goldman Sachs, a worldwide, full-service investment banking, broker-dealer, asset management and financial services organization and a major participant in global financial markets. Goldman Sachs provides a wide range of financial services to a substantial and diversified client base that includes corporations, financial institutions, governments and individuals. Goldman Sachs acts as broker-dealer, investment adviser, investment banker, underwriter, research provider, administrator, financier, adviser, market maker, trader, prime broker, derivatives dealer, clearing agent, lender, counterparty, agent, principal, distributor, investor or in other commercial capacities for accounts or companies or affiliated or unaffiliated investment funds.

Consistent with the Proposed Rule's stated objectives relating to transparency, we are committed to providing our advisory clients with full and fair disclosure of all material facts relating to the advisory relationship in accordance with our fiduciary duty under the Investment Advisers Act of 1940, as amended.[2] However, we are concerned that elements of the Proposed Rule create overly burdensome disclosure requirements that not only impose significant costs to both advisers and portfolio investments but also present practical difficulties with compliance given the scope and timing of certain of the proposed disclosures. These issues are most acute with respect to provisions of the Proposed Rule that require disclosure of information about not

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[1] References to the "Asset Management Division" or "AMD" in this comment letter refer collectively to the primary division and legal entities that comprise the investment management business units of The Goldman Sachs Group, Inc. ("GS Group" and, together with its affiliates, "Goldman Sachs').

[2] *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers (the "2019 Interpretation"), Advisers Act Release No. IA-5248 (June 5, 2019), *available at* https://www.sec.gov/rules/interp/2019/ia-5248.pdf.

only the adviser but also underlying investments and related persons of the adviser.[3]

For example, the proposed requirement that quarterly reporting be completed 45 days after quarter-end will be difficult to comply with for many advisers, particularly with respect to including portfolio investment-level information in the reports. AMD serves as a manager to a number of pooled investment vehicles that invest in other types of funds, known as funds-of-funds. Advisers like AMD that manage funds-of-funds would need additional time and resources to obtain reporting information with respect to underlying portfolio investments because these funds typically rely on reporting and valuations received from underling third-party fund sponsors in order to value their own fund-of-funds portfolios. Practically, a fund-of-funds sponsor like AMD is not likely to receive reporting from an underlying fund until the 45-day deadline imposed by the Proposed Rule, making it impossible for the sponsor to comply with the Proposed Rule's requirements. As such, fund-of-funds sponsors will require additional time beyond the proposed 45-day deadline in order to comply with the Proposed Rule's quarterly reporting requirements. Moreover, it is not clear that fund-of-funds investors will benefit from this level of reporting given the nature of the investment and may not want to bear the additional cost of preparation. Accordingly, we believe funds-of-funds should be exempt from the portfolio investment-level quarterly reporting requirements set forth in the Proposed Rule.

In addition, the costs and practical burdens associated with disclosure requirements in the Proposed Rule become difficult to justify when the requirements do not adequately take into account existing mitigating factors, including the types of structural protections that financial services firms like Goldman Sachs have put in place, such as information barriers and other policies and procedures reasonably designed to mitigate potential conflicts of interest that may arise when one Goldman Sachs line of business provides financial services to a client of another Goldman Sachs line of business. A principal example is the provision in the Proposed Rule which would require private fund advisers to disclose fees and other amounts paid by portfolio investments to related persons. We believe the current scope of this provision is unnecessary to achieve the SEC's stated goals set out in the Proposed Rule and, if adopted as proposed, would disproportionally impact advisers (as well as their portfolio companies) that are affiliated with large financial services firms with multiple lines of business like Goldman Sachs.

For the reasons discussed in this letter, we do not believe that a provision requiring disclosure of fees and other amounts paid by portfolio investments to related persons should be adopted. However, if this type of provision is ultimately adopted, we believe it should be narrowly tailored as described further below to circumstances where an adviser causes, or has actual controlling influence over the decision that causes, fees and other amounts to be paid to the adviser or its related persons. We propose an alternative below under "*Recommendations to Tailor the Proposed Rule*."

We believe that this approach would more appropriately tailor the rule by requiring disclosure of those transactions with related persons that are more likely to implicate the types of conflicts of interest that are the stated target of the Proposed Rule. At the same time, it would avoid unduly burdensome and potentially confusing reporting and information gathering, which raises significant concerns about disclosure of confidential transactions and competitively

[3] This letter is not intended as a comprehensive response to all of the SEC's requests for comments. We endorse the comment letters submitted by the Securities Industry and Financial Markets Association (SIFMA), The American Investment Council (AIC) and the Private Investment Funds Forum (PIFF) in response to the Proposed Rule.

sensitive information that is not justified by the potential benefits to investors.

Scope of the Proposed Rule

The approach set out in the Proposed Rule captures not only fees and other amounts paid by the portfolio investment to the adviser but also to *all* of its "related persons".[4] The SEC explains that the scope of the provision is necessary "[b]ecause advisers often use separate legal entities to conduct a single advisory business."[5] The text of the provision, however, would extend the disclosure requirement beyond a firm's advisory business when the organization provides a range of financial services to clients and customers in the ordinary course. This is seemingly inconsistent with the SEC's express determination not to propose a broader definition of "related person" in order to avoid "captur[ing] entities or persons outside of the ones advisers typically use to conduct a single advisory business."[6]

The Proposed Rule therefore casts an unnecessarily broad net without providing any empirical support that detailed fee information benefits investors in any meaningful way when required in this context. The problem is magnified where the adviser has not caused or influenced a portfolio investment to engage a related person in connection with the provision of services.[7] Requiring disclosure of fee information under these circumstances could imply the existence of a conflict of interest that has not been appropriately mitigated and/or disclosed, and therefore increase the risk of investor confusion and undermine the SEC's stated goal to "improve transparency for investors into the potential conflicts of interest of the adviser and its related person."[8] This confusion would be magnified in the case of fund-of-funds by overwhelming investors with extensive disclosures of any fees or other payments made to an adviser's related persons by hundreds or even thousands of underlying funds and each of their underlying portfolio investments, where the risk posed by a potential conflict of interest relating

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4 "Portfolio investment compensation" is defined to mean any compensation, fees, and other amounts allocated or paid to the adviser or any of its related persons by the portfolio investment attributable to the private fund's interest in such portfolio investment.

"Related person" is defined to mean (1) all officers, partners, or directors (or any person performing similar functions) of the adviser; (2) all persons directly or indirectly controlling or controlled by the adviser; (3) all current employees (other than employees performing only clerical, administrative, support or similar functions) of the adviser; and (4) any person under common control with the adviser.

5 87 Fed. Reg. 16886, 16897, n. 54 (the "Proposing Release").

6 Proposing Release at 16893.

7 As a financial holding company regulated by the Board of Governors of the Federal Reserve System (the "FRB"), GS Group is generally not permitted under FRB rules to "routinely manage" a portfolio investment that Goldman Sachs has acquired under the merchant banking authority of Section 4 of the Bank Holding Company Act of 1956, as amended. The prohibition on routinely managing a portfolio investment restricts, among other things, certain executive officer and employee interlocks between Goldman Sachs and the portfolio investment. Goldman Sachs therefore avoids these types of arrangements with portfolio investments of its underlying funds, which further mitigates concerns about potential conflicts of interest in respect of portfolio investment-level transactions and fees in the context of an adviser like AMD which is part of an organization subject to regulation and supervision by the FRB.

8 Proposing Release at 16897.

to such payments is even more attenuated.

The Proposed Rule's Impact on Large Financial Services Firms

If adopted as proposed, the Proposed Rule would have a disparate impact on advisers, independent portfolio investments and related persons affiliated with large financial services firms such as Goldman Sachs because it would require the disclosure of information that is both competitively sensitive and confidential that would not be required to be disclosed but for the Proposed Rule.

As noted above, Goldman Sachs provides a wide range of financial services, including investment banking, broker-dealer, clearing, administrative and many other services, to a substantial and diversified client base. A standalone investment management firm that conducts a single advisory business through multiple legal entities, on the other hand, may not provide financial services other than advisory services, and if it does, it may provide such services only to portfolio investments managed and controlled by the firm's private funds. The Proposed Rule, therefore, would expose the large financial services firm to the risk of having its competitively sensitive pricing information broadly disseminated to competitors and other potential clients outside of its advisory business,[9] but would not pose the same risk to a standalone investment management firm that is more likely to provide these services only within the context of its advisory business. Importantly, where the large financial services firm maintains operationally independent lines of business, as described below, conflicts of interest risks arising from arrangements between related persons and portfolio investments are reasonably mitigated and fee arrangements with portfolio investments will generally be reflective of the broader market in which the financial services firm operates.

In reliance on pre-existing SEC and staff guidance, Goldman Sachs has adopted and operated under internal policies and procedures designed to mitigate perceived conflicts of interest that may arise when a Goldman Sachs affiliate is being considered for the provision of services to a portfolio investment of an investment fund managed or advised by AMD. As an example, Goldman Sachs' operational structure is designed such that the non-AMD divisions of Goldman Sachs with expertise in providing various financial services are operationally separate from AMD, including as a result of physical separation, management by distinct personnel and imposition of information barriers or "need to know" policies to prevent the sharing of information across divisions. In addition, in circumstances where AMD has appointed a director to the board of a portfolio investment underlying an AMD-managed investment fund, we have policies providing that a director disclose his or her affiliation to Goldman Sachs and generally recuse himself or herself from the decision regarding any potential engagement of Goldman Sachs by such portfolio investment (including the specific discussions and negotiations of fees).

We believe that the structure of Goldman Sachs (that is, operationally separate lines of business), which we understand is consistent with other large financial services firms, as well as the foregoing protocols applicable to portfolio investment directors, appropriately mitigate potential conflicts of interest that can arise when a portfolio investment of an investment fund managed or advised by AMD considers engaging another division of Goldman Sachs to provide services. This disclosure and recusal process is consistent with principles of Delaware

[9] As described below, although information disclosed to investors is generally confidential, we assume that broadly disseminated information to investors would become generally known in the market.

corporate law governing board consideration and approval of transactions involving interested directors.[10]

Costs and Practical Burdens of Implementation

The following example demonstrates the administrative burden and complexity on Goldman Sachs or similar institutions, as well as on underlying portfolio investments, imposed by the Proposed Rule's requirement to disclose fees and other amounts paid by portfolio investments to related persons:

- An investment fund managed or advised by AMD (the "AMD Fund") owns less than 25% of Industrial Company X ("Company X"), and the AMD Fund has the right to appoint one of five directors to Company X's board.

- The other shareholders of Company X are a combination of other sophisticated private equity sponsors, sovereign wealth funds and Company X's management team.

- Over the life of the AMD Fund's investment in Company X, the management team, the board of directors and/or the shareholders of Company X may consider or execute on any of the following ordinary course transactions: one or more public or private debt or equity offerings to raise capital for growth, cash management, purchases or sales of assets, change of control transactions, currency or commodity hedges and/or advice with respect to any of the foregoing ("Company Transactions"). To advise on or provide execution of such Company Transactions, Company X may evaluate and engage Goldman Sachs and other financial services firms.[11]

There are a number of practical limitations on the ability of AMD to obtain and provide information about any fees that may be paid to other divisions of Goldman Sachs in connection with these Company Transactions, as well as concerns about the appropriateness of required disclosure of competitively sensitive engagements and related fees in circumstances where the risks associated with potential conflicts of interest have been reasonably mitigated and disclosed.

First, as described above, other lines of business of Goldman Sachs that are operationally independent from AMD have information barriers, with distinct management roles and separation of personnel. As a result, AMD may not learn about an engagement of another Goldman Sachs business line unless the information came through the portfolio investment. For example, ordinary course currency hedges or commodity hedges to mitigate risks related to a supply contract would not be presented to a board of directors or a shareholder, and so

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[10] *See* DGCL § 144.

[11] Divisions and business units within Goldman Sachs and separate and apart from AMD are capable of, and in many cases have market leading expertise in, providing companies and management with advice or execution with respect to each of the foregoing Company Transactions. It is therefore reasonable to assume that Company X would consider and determine to engage Goldman Sachs without any prompting from representatives of AMD.

neither the AMD director nor the AMD Fund would in the ordinary course have access to the relevant information about Goldman Sachs' involvement.[12] Further, depending on the nature of the Company Transaction, confidentiality obligations and client requirements may prohibit the sharing of information between business lines.

Second, to the extent a Company Transaction is brought to the board of directors and Company X is considering engaging Goldman Sachs, the AMD director would generally recuse himself or herself from any decision to engage Goldman Sachs pursuant to Goldman Sachs' internal protocols described above. This would generally include a recusal by the director from discussions relating to fees, with the result being that AMD would not be in a position to influence the amount of any fees paid to Goldman Sachs.

Third, the disclosure of the information itself is problematic for the following reasons.

- But for the Proposed Rule, Company X generally would be under no obligation to disclose that it has hired the related person of an advisor or engaged in a transaction with a related person as the counterparty until the Company Transaction has been announced (and potentially not even then, depending on the nature of the Company Transaction). Therefore, the requirement under the Proposed Rule could result in the broad dissemination of material non-public information, specifically that Company X's management team may be considering a Company Transaction, which poses potential concerns (including that investors may not want to be in possession of such information) with no corresponding benefit.

- Information regarding fees and other amounts earned by divisions of Goldman Sachs may be competitively sensitive information and could be made available to Goldman Sachs' competitors if the Proposed Rule is adopted. Although the information is generally confidential, we assume that broadly disseminated information to investors, many of whom may be employed by competitors or are also investors in private funds sponsored by competitors, would become generally known in the market. In addition, in an analogous context, the SEC acknowledged that disclosure of competitively sensitive information could impair negotiation of more favorable terms for investors and provided relief from the relevant disclosure requirement.[13]

The foregoing example assumes that the AMD Fund is a sufficiently significant shareholder in the underlying portfolio investment that it has the right to appoint a representative to the company's board of directors. In circumstances where the AMD Fund is a non-controlling shareholder in a portfolio investment, or a lender without right to receive information in respect of Company Transactions, AMD's access to information regarding Company Transactions and

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12 In order to mitigate and manage conflicts at Goldman Sachs, control side functions, including legal, compliance and the conflicts resolutions group, would be aware of the potential conflicts or multiple roles of Goldman Sachs related to a portfolio company. However, for the reasons described below, a disclosure obligation can present complexities that outweigh the potential benefit to investors where the risk of conflicts of interest is reasonably mitigated.

13 *See, e.g.*, Investment Company Act Release No. 33464; 812-14194-03 Carillon Series Trust, et al. (May 2, 2019), *available at* https://www.sec.gov/rules/ic/2019/ic-33464.pdf ("In particular, Applicants state that if the Adviser is not required to disclose the Subadvisers' fees to the public, the Adviser may be able to negotiate rates that are below a Subadviser's "posted" amounts. Applicants assert that the relief will also encourage Subadvisers to negotiate lower subadvisory fees with the Adviser if the lower fees are not required to be made public.").

ability to influence decisions regarding fees paid to another Goldman Sachs division is even more limited.

Recommendations to Tailor the Proposed Rule

The practical considerations outlined above demonstrate why the Proposed Rule's current formulation is problematic and the requirement to disclose fees and other amounts paid by portfolio investments to related persons should not be adopted. Investors in private funds are protected by the federal fiduciary duty owed by an adviser to its clients, specifically the duty of loyalty, which requires the adviser to "eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advise which is not disinterested such that a client can provide informed consent to the conflict."[14] This requirement, already applicable to private fund advisers, addresses the conflict of interest concern stated by the SEC in the Proposed Rule.

If, however, payments by portfolio investments to related persons are ultimately required to be disclosed, we believe that the SEC should exempt from the reporting requirements amounts paid to related persons of the adviser in appropriate circumstances. Specifically, disclosure should not be required where: (i) the related person is operationally independent[15] of the adviser, (ii) personnel associated with the adviser recuse themselves from any decision to engage the adviser's related persons, or (iii) the adviser does not control the portfolio company; provided, in each case, that the adviser has fully and fairly disclosed to investors the circumstances under which amounts may be paid to related persons in accordance with the adviser's fiduciary duty.[16] To the extent disclosure of fees and other amounts paid by portfolio investments to related persons is required because none of the foregoing conditions are met, the disclosure should be presented on an aggregated basis to mitigate the costs and burdens described above.

Excluding the disclosure of fees and other amounts paid by portfolio investments to related persons under these circumstances would not undermine the policy goal of the Proposed Rule, which is to bring transparency to investors regarding the full cost of investing in private funds.[17] In addition, if other provisions of the Proposed Rule are adopted, investors would receive enhanced disclosures regarding fees and expenses (including fund-level fees and

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14 2019 Interpretation.

15 Although not directly or wholly applicable, we believe the definition of "operationally independent" under the SEC's custody rule and the conditions under which an affiliate is not considered an "affiliated purchaser" under Regulation M are useful constructs to draw from to delineate between related persons that present conflicts of interest concerns and those that do not. See 17 CFR § 275.206(4)-2(d)(5); 17 CFR § 242.100(b). We would suggest that, in order for a private fund adviser to be considered "operationally independent" from a related person, the related person and the adviser be separately identifiable departments or divisions within the applicable firm with policies and procedures reasonably designed to prevent the flow of information between them, including through physical separation of personnel and the absence of personnel who hold positions across the relevant departments or divisions.

16 *See* the 2019 Interpretation.

17 The Proposed Rule does not require disclosure of all economic benefits that private fund advisers and their related persons receive in connection with their management of private funds. Instead, the Proposed Rule is focused on costs to portfolio investments and the indirect financial impact on investors. *See, e.g.,* Proposing Release at 16892 (asking whether private fund advisers or their related persons receive other economic benefits that the rule should require advisers to disclose in the quarterly statement).

expenses in the aggregate, with fees broken out to show those paid to the adviser and its related persons, as well as fees paid by the portfolio investment to the adviser) that achieve the policy goal of the Proposed Rule stated above.

Conclusion

We appreciate your consideration of our comments and suggestions on the Proposed Rule. We would be happy to provide any additional information or to discuss any of our comments and suggestions in more detail.

Sincerely,

Kathryn H. Ruemmler

Kathryn H. Ruemmler
Chief Legal Officer & General Counsel
The Goldman Sachs Group, Inc.